

# INTERNET GOVERNANCE AND INTERNATIONAL LAW

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The WGIG's multidisciplinary approach allowed it to address Internet governance issues from technical, policy, economic, institutional, and legal perspectives. Although legal considerations were not the priority of the WGIG, the WGIG process confirmed that all Internet governance issues include important legal aspects. Legal discussions within the WGIG focused on:

- legal issues *per se*, including cybercrime, intellectual property rights, data protection, privacy rights, and consumer rights;
- legal mechanisms for addressing Internet governance issues, including self-regulation, international treaties, and jurisdiction.

After the presentation of the WGIG Report, the WSIS negotiations have mainly dealt with potential Internet governance mechanisms, including institutionalization options. Legal considerations are becoming crucial in exploring the various ways and means of fitting proposed institutional designs for Internet governance within existing national and international legal frameworks. Some of the questions under discussion, not only in the WSIS Preparatory Meetings, but also in the corridors of the Palais des Nations and in online forums include: How to facilitate the participation of various stakeholders within the state-centered international legal system? What would be the most suitable international legal instrument for addressing Internet governance issues? What is the relationship between international public and private law in the field of Internet governance?

The aim of this paper is to contribute to an initial conceptual mapping of the legal aspects of Internet governance. It will reflect on the legal issues discussed so far during the WGIG/WSIS process. However, the main emphasis will be on the legal issues, which are likely to influence Internet governance discussions following the conclusion of the WSIS in Tunisia.

## **Cyberlaw vs. Real Law**

The WSIS/WGIG Internet governance process was instigated almost two years after the Dot-Com Bubble burst (in 2000). A more mature and realistic discussion of the various effects of the Internet on society gradually replaced the early Internet hype of the 1990s. Currently, two paradigms, generally described as “techno-optimism” and “techno-realism,” create the underlying conceptual basis for Internet governance discussions. In the legal field, proponents

of “techno-optimism” argue for the development of “cyber-law,” while the “techno-realists” argue that the solution for the Internet rests with the use of “real law.”

A “cyber-law” approach presumes that the Internet has brought about new types of social interaction in cyberspace. Consequently, new “cyber-laws” for cyberspace need to be developed. In the early days, the proponents of this approach argued that the Internet de-links our social and political interaction from the current territorial organization of the world, which rests on the notion of the sovereign state. This argument is best epitomized by John Barlow’s famous message to the governments of the world: “You are not welcome among us. You have no sovereignty where we gather. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear. Cyberspace does not lie within your borders.”<sup>1</sup> Presently, this particular argument is of mainly historical relevance. The current proponents of a “cyber-law” approach argue that the sheer speed and volume of Internet cross-border communication hinders the enforcement of existing legal rules and requires the development of new “cyber-laws.”<sup>2</sup>

A “real law” approach is based on the assumption that the Internet is not conceptually different from previous telecommunication technologies, from smoke signals to the telephone. Though faster and more far-reaching, the Internet still involves communication over distances between individuals. Consequently, existing legal rules can be applied to the Internet.

Although both approaches contain valid elements, the real law approach is becoming predominant in both theoretical analyses and policies. Notably, the WSIS/WGIG discussions on Internet governance emphasized the need to use existing national and international legal mechanisms for regulating the Internet. For some issues, however, such as trademark protection, real law rules would need to be adapted in order to apply to the Internet. Newly designed rules must regulate other issues, such as spam. It is difficult to envisage any existing rule that might be applied to spam. The closest real world analogy to spam, junk mail, is not illegal.

### **Does the Internet Require Global Regulation?**

One frequently expressed view about Internet governance is that the global nature of the Internet requires global Internet regulation. Proponents of this view support the need for global regulation with examples, such as the lack of effective national measures to combat spam or cybercrime. The typical line of thinking goes like this: any country outside of global

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<sup>1</sup> John Perry Barlow, “A Cyberspace Independence Declaration”, 1996, Electronic Frontier Foundation, Publication – John Perry Barlow Archive.

<sup>2</sup> David G. Post “Against ‘Against Cyberanarchy’” in, Adam Thierer and Clyde Wayne Crews Jr., ed. *Who Rules the Net?* (Washington, D.C.: Cato Institute, 2003), pp. 71-89.

regulation could become a “safe haven” for those intending to defy globally adopted Internet rules. One of the early examples supporting this argument was the initiator of the “I Love You” virus. The hacker, who created this virus, resident in The Philippines, could not be prosecuted for the worldwide damage caused by his virus because no such crime existed in Philippine legislation.

While global regulation may be desirable in many respects, national and regional regulations are assuming greater relevance. The Internet increasingly becomes anchored in geography. New technological developments, such as geo-location software, make it simpler to locate the geographical location of Internet users. Together with geo-location software, powerful filtering tools can limit Internet access based on the user’s country of origin. Besides technological devices, increasing legislative pressure in many countries requires ISPs to identify their users and, if requested, to provide necessary information about them to authorities. With such developments, the Internet will become a less anonymous medium. For many governments, the combination of technology and legislation is sufficient to ensure an acceptable level of enforcement of national legislation.<sup>3</sup> The more the Internet is anchored in geography, the less unique its governance will need to be.

### **The Use of the Variable Geometry Approach in Internet Governance**

The “variable geometry” approach has been widely used in international legal practice. Among the proponents of the variable geometry approach one should mention Judge Tanaka of the International Court of Justice, who stated the following in the South West Africa Case: “To treat unequal matters differently according to their inequality is not only permitted but required.”<sup>4</sup> Professor Abi Saab finds a conceptual framework for variable geometry in differentiating between the international law of coexistence, based on the principle of sovereign equality, and the international law of co-operation, which includes the equality of participation but the differentiation of tasks and obligations.<sup>5</sup>

The need to accommodate states with different capacities and interests within the same international framework gradually triggered various forms of variable geometry. One of the well-known examples is veto power of five permanent members of the United Nations Security Council. Many international organizations, such as the International Monetary Fund

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<sup>3</sup> Enforcement does not mean that prohibited behaviour will become impossible. People with technical skills will still be able to bypass various technological barriers. However, for many governments it is important that the majority of ordinary users remain within parameters specified by legislation.

<sup>4</sup> South West Africa (Diss. Op. Tanaka), Second Phase, Judgment, *ICJ Reports* (1996) 6, at 306.

<sup>5</sup> Georges Abi-Saab, “Whither the International Community?” *European Journal of International Law* 9 (1998).

and the World Bank, rely on variable geometry. Other examples include commodity organizations, such as the International Tropical Timber Agreement, which distinguishes between consumer and producer member states. Voting power is allocated according to the share in the total tropical forest resources. International environmental law has developed the principle of common but differentiated responsibility, which contains two main elements: a) common responsibility of countries for the protection of the environment on local, regional, and global levels; b) differentiated contributions to reducing environmental harm based on criteria such as a particular country's historical contribution to environmental damage and its capacity to prevent and reduce further environmental damage.<sup>6</sup> The principle of common but differentiated responsibility could apply to treatment of "Internet pollution," such as spam and viruses.<sup>7</sup>

Internet governance requires the involvement of a variety of stakeholders who differ in many aspects, including international legal capacity, interest in particular Internet governance issues, and available expertise. Such variety could be accommodated within a single Internet governance framework, through the use of the variable geometry approach. This approach, which reflects stakeholder interests, priorities, and capacities to tackle Internet governance issues, is implied in Article 49 of the WSIS declaration, which specifies the following roles for the main stakeholders:<sup>8</sup>

- States – "policy authority for Internet-related public policy issues" (including international aspects);
- the private sector– "development of the Internet, both in the technical and economic fields";
- civil society–"important role on Internet matters, especially at community level"; intergovernmental organizations – "the coordination of Internet-related public policy issues."
- international organizations – "development of Internet-related technical standards and relevant policies"

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<sup>6</sup> The Principle of Common but Differentiated Responsibility was used in the Rio Declaration (1992) and the Framework Convention on Climate Change (1992). The principle of differentiated responsibility is used in various international legal instruments, including the Barcelona Convention from 1976 [Article 11 (3)] and the Preamble of the United Nations Convention on the Law of the Sea (1982).

<sup>7</sup> "Polluter Pays" is another principle that could be borrowed from environmental law and used in dealing with "Internet Pollution."

<sup>8</sup> See: World Summit on the Information Society, "Declaration of Principles", WSIS-03/GENEVA/DOC/4-E, 12 December, 2003, Article 49.

Variable geometry can be implemented through mechanisms that would need to include different core responsibilities for tackling particular Internet governance issues and a carefully weighted decision-making process, including the necessary checks and balances.

One possible criticism of the use of variable geometry in Internet governance is that the creation of such a system would require lengthy and detailed negotiations, especially in the grey zones, where various stakeholders may have competing and conflicting interests (e.g. the management of the core Internet resources). In negotiating grey zone issues, the win-win potential of variable geometry could be limited by the zero-sum approach to negotiations.

### **The Difference between International Public Law and International Private Law**

The need for the use of international law is frequently raised in Internet governance discussions. The context within which such references are made, very often leads to certain conceptual and terminological confusion. The term *international law* is mainly used as a synonym for international *public* law, established by nation states and international organizations, usually through the adoption of treaties and conventions.<sup>9</sup> However, most possible international legal cases regarding the Internet include a strong private law feature, involving such issues as contracts and torts. In dealing with such issues, there is a need to use international private law, which creates an additional element of terminological confusion. Namely, the term *international private law* is, to a large extent, a misnomer. *Conflict of laws*, the term used in the United States, is more precise. The rules of international private law are stipulated in national legislation, not in international treaties.<sup>10</sup> The rules of international private law specify the criteria for establishing applicable jurisdiction and law in legal cases with foreign elements (e.g., legal relations involving two or more entities from different countries). The criteria for identifying the applicable jurisdiction and law include the link between an individual and national jurisdiction (e.g., nationality, domicile) or the link between a particular transaction and national jurisdiction (e.g., where the contract was concluded, where the exchange took place).

### **International Private Law**

Given the global nature of the Internet, legal disputes involving individuals and institutions from different national jurisdictions are very frequent. However, only rarely has international private law been used for settling Internet-based issues, possibly because its' procedures are

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<sup>9</sup> Other sources, according to the Statute of International Court of Justice, include customary law and general principles of law (see: Article 38 of the Statute of the International Court of Justice, UNCIO, Vol. 15, 355).

<sup>10</sup> A few international attempts have been made to harmonize international private law. The main global forum is the Hague Conference on International Private Law, which has adopted numerous conventions in this field.

usually complex, slow, and expensive. The main mechanisms of international private law developed at a time when cross-border interaction was less frequent and intensive and proportionally fewer cases involved individuals and entities from different jurisdictions.

International private law requires modernization in order to meet the needs of the Internet-based world, characterized by fast, simple and pragmatic *modus operandi*. Possible modernization might include simplified procedures for identifying appropriate jurisdictions and laws, the option of online deliberation, and flexible arrangements for legal counseling.

### **The Harmonization of National Laws**

In the case of the need for global regulation, the most efficient option is the harmonization of national laws, resulting in the establishment of one set of equivalent rules at the global level. With identical rules in place, the question of applicable jurisdiction should become less relevant. If the same rules are applied, it becomes less relevant whether the court case is adjudicated, for example, in the USA or France. The harmonization of national laws can be achieved in areas where a high level of global consensus already exists, for example, regarding child pornography, piracy, and slavery. Views are converging on other issues too, such as spam and Internet security. However, in some fields, including content policy, it is not likely that a global consensus on the basic rules will be reached.

### **International Public Law**

International public law regulates relations between nation states. Some international public law instruments already deal with areas of relevance to Internet governance (e.g. telecommunication regulations, human rights, international trade). It remains to be seen if international public law will be used more intensively in the field of Internet governance. In this part, the analysis will focus on the elements of international public law that could be used in the field of Internet governance, including treaties and conventions, customs, “soft law,” and *ius cogens*.

### ***Treaties and Conventions*<sup>11</sup>**

Currently, the only convention that deals directly with Internet-related issues is the Council of Europe Cybercrime Convention. However, many other international legal instruments address

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<sup>11</sup> The designations *treaty* and *convention* are used interchangeably in order to describe international legal instruments. The term *treaty* is used in the Vienna Convention on the Law of Treaties (1969). The term *convention* is used in Article 38(1)(a) of the Statute of the International Court of Justice. Other names are used as well: charter, covenant, agreement, protocol, and exchange of notes. The legal status of international legal instruments is not conditioned by name or by the form in which they are adopted.

broader aspects of Internet governance. For example, in the field of telecommunications, ITU regulations (Radio Regulations and International Telecommunication Regulations) govern issues related to telecommunication infrastructure.<sup>12</sup> Another set of Internet-related instruments deals with human rights. Freedom of expression is protected by Article 19 of the Covenant on Political Rights. Global and regional human rights instruments regulate other Internet-related rights, such as privacy and the right to information. In the field of dispute resolution, one of the main instruments is the New York Convention on Arbitrations (1958).

One of the Internet Governance Project's contributions to the WGIG discussions was its proposal for the adoption of the United Nations Framework Convention on Internet Governance.<sup>13</sup> The "framework-protocol" approach consists of the framework convention, which provides general principles, and subsequent protocols that provide more specific regulation.<sup>14</sup> The proposal of the Internet Governance Project rests on the analogy with the United Nations Framework Convention on Climate Change (1992). The following similarities between climate change and the Internet were underlined: involvement of a broad range of actors, including non-governmental organizations; a broad agreement on principles and norms; and a need to establish procedures for dealing with future issues. The possible differences between climate change in 1992 and Internet governance in 2005 is "ripeness" for the issue to be regulated by international convention. The WSIS/WGIG debate clearly indicated differences among main players, including disagreement about core Internet governance principles and norms. Although the "framework-protocol" approach would be an appropriate mechanism for regulating such a broad field as Internet governance, the introduction of this mechanism would require more time in order to develop wider support for the main Internet governance principles and norms.

### ***Customary Law***

Development of customary rules includes two elements: general practice (*consuetudo*) and recognition that such practice is legally binding (*opinio juris*). It usually requires a lengthy time-

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<sup>12</sup> Although ITU regulations do not have the usual designation of convention or treaty, they are international, legally binding instruments.

<sup>13</sup> Mathiason, J. "A Framework Convention: An Institutional Option for Internet Governance," Concept Paper for the Internet Governance Project, December 2004 (<http://dcc.syr.edu/miscarticles/igp-FC.pdf>).

<sup>14</sup> Examples of the framework convention supported by protocols are the 1985 Vienna Convention on the Ozone Layer and its 1987 Montreal Protocol with its subsequent amendments; the 1992 United Nations Framework Convention on Climate Change with its 1997 Kyoto Protocol; and the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes with its 1999 Protocol on Water and Health and its 2003 Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.

span for the crystallization of general practice. This was possible in the past. However, technological progress after the Second World War required the rapid introduction of international regulatory frameworks, given the profound economic and political consequences that these changes generated in a very short time-span. The Internet is a good illustration of this tendency.

One possible solution for overcoming tension between, on one hand, increasingly fast modern life and, on the other hand, the slow process of development of customary law was proposed by Roberto Ago who introduced the concept of *diritto spontaneo* or “instant customary international law.”<sup>15</sup> This concept emphasizes *opinio iuris* and gives lower significance to general practice. The view has been criticized since it underestimates the importance of practice, which is the core element of customary law. In current international law, only one possible reference exists in the International Court, that of the *North Sea Continental Shelf*, that opens the possibility of developing customary law in a relatively short passage of time: “an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and uniform.”<sup>16</sup>

Some elements of emerging custom appear in the way the US government exercises oversight over the Internet root. The US government has observed a general practice of non-intervention when it comes to administering the Internet root zone file, which is the first element in identifying customary law. It remains to be seen if such general practice originated with the awareness that it was legally binding (*opinio iuris*). If this is the case, there is the possibility of identifying international customary law in managing parts of the Internet root server system that deal with the country domains of other countries. It would be difficult to extend such reasoning to the legal status of gTLDs (com, org, edu, net), which do not involve other countries.

Customary law may also be developed for regulating security-related Internet governance issues (e.g., spam, protection of critical infrastructure, virus protection).

### ***Soft Law***

“Soft law” has become a frequently used term in the Internet governance debate. Most definitions of soft law focus on what it is not: a legally binding instrument. Since it is not legally binding, it cannot be enforced through international courts or other dispute resolution mechanisms.

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<sup>15</sup> R. Ago, *Science juridique et droit international*, RdC (1956-II), 849-955, at 932 et seq.

<sup>16</sup> International Court of Justice Report 1969, 43.



The linguistic criterion for identifying soft law is the frequent use of the word “should,” in contrast to the use of the word “shall;” the latter is usually associated with a more legally-binding approach codified in “hard” law (treaties). Soft law instruments contain principles and norms rather than specific rules. It is usually found in international documents such as declarations, guidelines, and model laws.

Why are some international documents considered to be soft law while others are not? For example, the Rio Declaration (1992) is soft law, but hundreds of other declarations adopted by the United Nations are not. The “legality” of soft law instruments is supported by the evidence that their norms are usually observed by many countries. Soft law could fall under the umbrella of Louis Henkin’s statement that, “Almost all nations observe almost all of their obligations almost all of the time.” When countries adopt a particular document, even if it is not legally binding, they express a certain commitment and moral obligation to observe it. The more negotiating energy put into reaching consensus and drafting a particular instrument, the more nation states are ready to support and observe such an instrument. This is one of the main elements that lead to the categorization of particular international documents as soft law.

As we can see, the difference between hard and soft law is not binary.<sup>17</sup> Moreover, some situations are *prima facie* paradoxical, where hard law conventions contain soft law rules and *vice versa*.<sup>18</sup>

Some soft law arrangements have had considerable political importance--such as the Helsinki Act from 1975, which established the framework for East-West relations and marked the beginning of the end of the Cold War. Other soft law instruments, such as the Stockholm Declaration (1972) and Rio Declaration (1992) have had a major impact and influence on the conduct of states in the field of environmental protection. More recently, the OECD Financial Action Task Force (FATF) adopted 40 recommendations on money laundering. Although the recommendations are soft law, the FATF established a very strict monitoring and reporting plus enforcement process that includes some very hard mechanisms, including the expulsion of a party from the FATF.

Soft law is used by states for various reasons, such as mutual confidence-building, stimulating development in progress, and introducing new legal and governmental mechanisms. Soft law has increasing importance, especially in situations where states agree on specific issues, but are

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<sup>17</sup> There are also examples when soft law forms, such as minutes of a meeting, received the status of hard law (Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility) (1994) ICJ Rep. At 112).

<sup>18</sup> For example the Framework Climate Change Convention contains numerous *shoulds* in Article 3 (soft law formulations); and some soft law instruments, such as the CSCE Helsinki Final Act from 1975, contain numerous *shalls* (hard law formulations).

not ready to bind themselves legally. Soft law is also sometimes preferred to hard law in order to avoid the potential complexity of the domestic ratification process. Another possible situation for the use of soft law instruments is in the process of the gradual development of norms that can result in the adoption of international legal instruments.<sup>19</sup>

The main corpus of existing instruments in the field of Internet governance is non-binding, and includes: the OECD Guidelines related to ICT and the Internet, the UNCITRAL Model Laws in E-Commerce, resolutions and declarations of the United Nations and other international organizations dealing with Internet governance related issues (e.g., the United Nations General Assembly Resolutions on Internet Security).

The main WSIS documents, including the Final Declaration, Plan of Action, and Regional Declarations have the potential to develop certain soft law norms. They are not legally binding, but they are usually the result of prolonged negotiations and acceptance by all countries. The commitment that nation states and other stakeholders put into negotiating these instruments and in reaching a necessary consensus creates the first element in considering that such documents are more than simple political declarations.<sup>20</sup>

Soft law provides certain advantages in addressing Internet governance issues. First, it is a less formal approach, not requiring the official commitment of states and, thereby, reducing potential policy risks. Second, it is flexible enough to facilitate the testing of new approaches and adjustment to rapid developments in the field of Internet governance, which is characterized by many uncertainties. Third, soft law provides greater opportunity for a multistakeholder approach than does an international legal approach restricted to states and international organizations.

### ***Ius Cogens***

*Ius cogens* is described by the Vienna Convention on the Law of Treaties as a “norm, accepted and recognized by the international community of States as a whole, from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>21</sup> One of the main characteristics of *ius cogens* rules is that they are

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<sup>19</sup> There are many examples of this evolution from the past. For example, the IAE Guidelines were the basis for the adoption of the Convention on Early Notification of a Nuclear Accident (1986); the UNEP Guidelines on Environmental Impact Assessment were further developed in the ECE Convention on Environmental Impact Assessment in a Transboundary Context.

<sup>20</sup> There is a high frequency of the use of the word “should” in the WSIS documents, one of the features of soft law instruments. For more information consult: Jovan Kurbalija, *The Emerging Language of ICT Diplomacy—Qualitative Analysis of Terms and Concepts*, DiploFoundation <<http://www.diplomacy.edu/IS/Language/html/words.htm>>.

<sup>21</sup> Article 53 of the 1969 Vienna Convention on the Law of Treaties.

inalienable. Professor Brownlie lists the following examples of *ius cogens* rules: the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, the rules prohibiting trade in slaves and piracy.<sup>22</sup> More conditionally, he also indicates the principle of permanent sovereignty over national resources and the principle of self-determination.<sup>23</sup> Can *ius cogens* be applied to the Internet? Some of the above-mentioned behaviours prohibited by *ius cogens*, such as piracy, slavery, and genocide cannot be performed via the Internet. Nevertheless, *ius cogens* covers behaviour that leads to such violations. Thus, *ius cogens* could be applied in such situations when the Internet is used for promotion or organization of prohibited acts, such as piracy, slavery, and genocide.

## Conclusion

The WGIG Report and other documents produced in the WSIS/WGIG process are a solid basis for reflection on the main issues of Internet governance. The Tunis WSIS Declaration will provide the necessary policy endorsement of the overall process and a possible basis for the soft law status of some agreed solutions.

The nature and intensity of future international legalization in the field of Internet governance will depend on the outcome of the WSIS in Tunisia. If the parties agree to introduce an inter-governmental regime, it would require harder international instruments such as treaties. Other institutionalization options based on a multistakeholder approach and a *sui generis* form of international organization would favour soft law legalization. It is very likely that any compromise solution to be reached at the WSIS in Tunis will require considerable creativity in designing the future institutional framework for Internet governance.

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<sup>22</sup> Ian Brownlie, *Principles of Public International Law* 5<sup>th</sup> Ed. (Oxford: Oxford University Press, 1999), p. 513.

<sup>23</sup> *ibid.*